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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1044

PAULINE JUNE FORSYTHE,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

ROBERT L. BALYEAT,
Prosecuting Attorney, Allen County,
110-112 N. Elizabeth Street,
Lima, Ohio,
Attorney for Respondent.

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BRIEF OF RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE.

On January 22, 1966, the residence of Mr. and Mrs. A. D. Aebker at 1429 Shawnee Road, Lima, Ohio, was burglarized. A number of items of personal property were stolen in the course of the burglary including a full length mink coat, a cashmere sweater with mink collar and a cashmere sweater with fox collar, all of which were the property of Elizabeth Aebker. Although an immediate investigation of the burglary was initiated by the Allen County Sheriff's Department no significant leads were developed until the afternoon of February 20, 1966, at which time information was received from a source previously proven reliable that the three (3) stolen articles above referred to had been sold by one James Tarter to June Forsythe and had been observed at the latter's residence at 224 East McKibben Street, Lima, Ohio. The following day an affidavit for a warrant authorizing a search of

the premises at 224 East McKibben Street, Lima, Ohio, was presented to Judge Roger Andrews of the Lima Municipal Court and that court ordered a search warrant issued. The testimony at the trial indicated that the affidavit was presented to Judge Andrews at approximately 6:30 P.M. on February 21, 1966 and that the warrant was executed at approximately 8:15 P.M. that same date. The residence located at 224 East McKibben Street was a large two-story dwelling containing some nine (9) rooms and a total of four (4) entrances or exits. Six officers including four (4) deputy sheriffs and two (2) officers from the Lima Police Department were present at the time the warrant was served. The officers were admitted to the home of the defendant by the defendant personally and the warrant was read to her and served upon her at that time. Deputy John Winters of the Allen County Sheriff's Department was in charge of the search and was the officer who served the warrant. After the warrant was read to the defendant she stated that she didn't know any James Tarter and that she didn't have any fur coats. (R. 202.) Deputy Winters replied: "Mrs. Forsythe, if you do have the coats, we would like to have them." (R. 202.) He then further explained to her "that they were taken in a burglary and that they had information that they were sold to her." He then re-iterated that if she had the coats they would like to have them and that if she did not give them up it would be necessary to search the house. Mrs. Forsythe again stated that she didn't have anything and that she didn't know any James Tarter. The officers then dispersed throughout the residence and commenced a search for the articles in question. During the period covered by the search the defendant moved freely about her home completely unrestricted in her movements by any officer. It should be added at this point

that when the officers arrived at the defendant's residence with the search warrant an adult male person was present, identified by the defendant only as "a friend" who remained on the premises during the entire period covered by the search. She was, therefore, never alone during this period as claimed in her petition herein. (See R. 226, 227.) Shortly after the commencement of the search it was discovered that a closet in the front bedroom on the first floor was locked. The defendant was asked if she had the key to this closet and she replied that the key had been lost. She was then advised that if the key was not located it would be necessary to remove the door forcibly and she then stated she would try to find the key. Sometime later the defendant produced a key that fit the closet. The closet was opened and found to contain, among other things, one (1) full length mink coat, one (1) three-quarter length mink coat or stole, two (2) short mink capes or stoles and one (1) three-quarter length mink cape or stole. Two of the coats had had the labels removed. When the coats were first removed from the closet the defendant was asked to whom they belonged, and she replied that they were hers. The coats were then laid out on a bed and individually shown to her and she identified each as being hers except for the full length mink coat (State's Exhibit A). This was said to have belonged to a girl that had come to her home as a roomer some five (5) months previously. At this point Deputy Winters returned to the closet and removed a cashmere sweater with a mink collar. The identifying label had been removed from this sweater. Deputy Winters asked the defendant if this sweater was hers and she stated that it was. This sweater was placed on the bed beneath the full length mink coat and out of view. Mr. and Mrs. Aebker were then contacted at their home and asked to come to the defendant's home

to see if they could identify any of the articles that had been recovered from the closet. When they arrived, Mrs. Aebker immediately identified the full length mink coat as being hers. She was then asked if anything else had been missing from her home and she replied that two (2) sweaters were missing. Deputy Winters then asked her to describe the sweaters and when she described a beige cashmere with a mink collar he lifted the full length mink and revealed the sweater beneath which she immediately identified as her own. Deputy Winters then asked Mrs. Aebker to describe the other sweater and after she had done so he went to the closet and removed a gray cashmere with a fox collar and jewelry attached which matched the description given and which she also readily identified as her own.

A third party, a Miss Heiman, was summoned to the residence at 224 East McKibben to see if she could identify certain of the other furs found at that address but she had no connection with the identification of the property of Mrs. Aebker and in fact, merely identified one of the other furs as being the property of the defendant. This person is affiliated with a local establishment which is involved in the sale and storage and cleaning of furs.

Upon completion of the search and the recovery of the three items of property belonging to Mrs. Aebker, the defendant was taken into custody and transported to the Allen County Jail where she was questioned and subsequently incarcerated. The April term of the Allen County Grand Jury returned an indictment against the defendant for the offense of concealing stolen property under Section 2907.30 of the Ohio Revised Code upon which these proceedings were had.

Prior to the trial the defense filed a motion to suppress "any and all evidence against her that might be in

the form of written or oral statements made by the defendant immediately before, at the time of, and following her arrest on this charge," for the reason that she was not properly warned of her constitutional rights as required by the decision in the case of *Miranda vs. State of Arizona.* A second motion was filed requesting that the defense be allowed to view all physical evidence in the hands of the Prosecuting Attorney. The latter motion was granted without argument. The former motion was granted as to all statements made following the time that the defendant was taken into custody after the search of her home but allowing all statements and answers given prior to being taken into custody and during the search: *at no time prior to trial was any motion filed on behalf of the defendant to suppress any physical evidence.*

This case proceeded to trial by jury on July 19, 1966 and a verdict of guilty in the manner and form charged in the indictment was returned on July 20, 1966, with the value of the property concealed being fixed at $1,000.00.

A motion for new trial was filed on behalf of the defendant on July 21, 1966 and upon the same being overruled by the trial court the statutory penalty was imposed and this appeal taken.

ARGUMENT.

In presenting our argument on behalf of the Respondent we will consider the questions presented by the Petitioner in the same sequence in which they appear on page 2 of her Brief filed herein.

I.

"Whether a state procedural rule that a defendant waives her privilege against the use of illegally seized evidence if she does not move to suppress said evidence prior to her trial can operate to deny her of her constitutional safeguards against the use of illegally seized evidence is a situation where the knowledge that the evidence was illegally seized was not available to the defendant until after her trial commenced?"

The evidence referred to here by the Petitioner consists of the mink coat, cashmere sweater with mink collar and the cashmere sweater with fox collar which were admitted in evidence at the time of trial as State's Exhibits A, B and C respectively. The procedural rule referred to is that pronounced by the Supreme Court of Ohio in the case of *State v. Davis* (1 Ohio St. (2d) 28; 30 O. O. (2d) 16, 1964) and which is as follows:

> "Where there has been an illegal search and seizure of evidence tending to incriminate an accused and such accused and his counsel know about such search and seizure in ample time to prepare and file a pretrial motion to suppress such evidence, a failure to do so will amount to a waiver by the accused of his right to object to admission of that evidence against him."

The articles in question were found in a locked closet in the bedroom of the Petitioner at her home at 224 E. McKibben Street, Lima, Ohio, during a search conducted on the evening of February 21, 1966 by members of the

Allen County, Ohio Sheriff's Department and the Lima Police Department. The search was made under the authority of a search warrant issued by Judge Roger D. Andrews of the Lima Municipal Court at approximately 6:30 P. M. the same date. No motion was made prior to trial to suppress these or any other items of *physical* evidence although written motions were made on behalf of Petitioner, in advance of trial, to suppress oral statements made by her during the search of her home and to require the Prosecuting Attorney to exhibit to the Petitioner and her attorneys all physical evidence then in his possession which he intended to introduce as evidence at the trial in this case. (A. 1, 2.) These two (2) motions were filed on July 8, 1966 and eleven (11) days prior to the commencement of the trial of this case. The motions came on for hearing on the 18th day of July, 1966 and one (1) day prior to the trial and a full hearing was held at which the Petitioner testified at length concerning the search conducted at her home on the night of February 21st and Deputy Sheriff John Winters testified on behalf of the State concerning the same subject matter. As to the motion to suppress oral statements made by the Petitioner the Court overruled the same as it applied to any statements made by the Petitioner during the search but sustained the motion as to all statements made following the time that she was arrested and taken into custody. The second motion was acquiesced in by the State, and Petitioner and her attorneys were afforded the full opportunity to view the three articles in question in advance of the trial.

When the exhibits in question were offered in evidence at the trial the defense objected to their admission on the ground that they were "illegally obtained." (R. 192.) No objection was offered by the defense to the identification of these exhibits by the State's first witness,

Mrs. Aebker, in the presence of the jury (R. 171-177) and to the similar testimony of Deputy Winters following the overruling of the objection. (R. 215, 216, 220.) Counsel for the Petitioner based their argument on the fact that the State had failed to make an affirmative showing of the "urgent necessity" for conducting the search during the nighttime and that the warrant thereby became invalid and the evidence seized thereunder inadmissible. Following the objection by the defense to the admission into evidence of State's Exhibits A, B and C, the following colloquy occurred between counsel which clearly establishes that counsel for defendant had full knowledge at that time of the grounds for their objection:

> "Mr. DaPore: We will enter an objection to these.
>
> The Court: What is the basis of the objection?
>
> Mr. DaPore: On the basis of them being illegally obtained, which will come out later in the trial.
>
> Mr. Balyeat: If that is the basis of the objection, perhaps we had better argue it at this time.
>
> Mr. DaPore: I think it will come out with the other evidence.
>
> Mr. Balyeat: I think that we should argue this right now.
>
> Mr. DaPore: Fine." (R. 192.)

Following this exchange between counsel and the Court the jury was dismissed and the objection to the admissibility of the articles was argued by counsel. It is significant that Petitioner did not order the transcript of the argument had on this objection or the hearing had on her pre-trial motion to suppress. It is also significant that the affidavit for the search warrant and the warrant issued thereupon were not offered in evidence at the trial or at any other stage of these proceedings. We suggest that the reason that this Court, and the reviewing courts below, were not afforded the opportunity to review the testimony

and argument at the hearing on the motion to suppress and upon the objection referred to was that it would conclusively establish that counsel for the defendant had, indeed, had to have had, full knowledge of the contents of the affidavit for the search warrant, the warrant itself and the details surrounding the search itself. The defense did not and has not raised any question regarding the proper return of the search warrant as required by the law of Ohio and in the absence of some showing that the warrant was not returned to the issuing Magistrate within a reasonable time it must be assumed that such was accomplished in conformity to law. Thus, the attorneys for the Petitioner had several months in which to examine and re-examine the affidavit and search warrant and to review with their client the circumstances surrounding the search itself. Additionally, they had the benefit of the testimony given by their client and that of Deputy Winters at the hearing on their motion to suppress the oral statements made by the Petitioner during the search, as well as the opportunity to view prior to trial the physical objects obtained during the search. In the face of this they now argue that the rule of the *Davis* case is not applicable to the present case because "the knowledge that the evidence was illegally seized was not available to the defendant until after her trial commenced." (Question I, *supra.*) Actually, the procedural requirement stated in the *Davis* case does not require that an accused or his counsel have specific knowledge of facts which would render the search unreasonable or illegal but at the most would require that such accused or his counsel have reasonable grounds to assume that the search was unreasonable. To conclude otherwise would require this Court and every reviewing Court to determine in each case the factual question of whether the accused or counsel had actual knowledge of

facts and circumstances clearly establishing the illegality of the search.

It is interesting to note that Petitioner claims in her brief that the objection entered by her counsel at the time State's Exhibits A, B and C were offered in evidence was a general objection only. (pages 7 and 8 of petitioner's brief.) The following language then appears: "Her objection was overruled and the items admitted, after argument off the record." (Petitioner's Brief, page 8.) First, the argument was, of course, not off the record. It simply was not transcribed by the court reporter because it is the practice of reporters in this jurisdiction not to transcribe the argument of counsel on objections taken during the trial unless requested to do so by the party ordering the bill of exceptions. Secondly, it is inconceivable that counsel would now claim that their objection went only to the competency, relevancy and materiality of the evidence offered where that evidence consisted of the three items that were alleged in the indictment to have been unlawfully concealed by the Petitioner and where counsel stated at the time of making such objection that the ground was the evidence being illegally obtained. (R. 192.)

It is the contention of the Respondent that it would be difficult to imagine a set of facts more on all fours with the holding of the court in the *Davis* case than the one before us. Since the Petitioner is not now and did not previously in her initial appeal to the Court of Appeals contest the propriety or validity of the procedural rule enunciated in the *Davis* case but only contends that the rule does not apply to the facts in this case we have not deemed it necessary or even appropriate here to discuss the rationale of that decision. Some confusion may have been generated as to the Petitioner's position regarding that rule by reason of the variation in the language used

by her in her Assignments of Error to the Court of Appeals and the Question of Law presented to the Ohio Supreme Court. The assignment of error to the Court of Appeals on the question we have been discussing was as follows:

> "The Court permitted the State of Ohio to present to the jury evidence that was illegally seized from the home of the defendant." (Petitioner's Brief, page 11.)

The Question of Law presented to the Supreme Court arising from the same point read:

> "Was the admission of items obtained in an illegal search and seizure prejudicial to the rights of the accused where a motion to suppress was not made prior to trial but was made during the trial when the defendant first learned that the search was illegal? *Is a pre-trial motion to suppress illegally obtained evidence always necessary?*" (Emphasis supplied.)

The confusion arising from the variation in language set forth above is further enlarged by the argument of counsel for Petitioner at pages 14 and 15 of their brief where they speak of running afoul of the Ohio procedural rule and claiming that "Such procedural defaults in federal courts do not deprive the defendant of his constitutional safeguards." Although this language may suggest that the Petitioner is now attacking the merits of the Ohio procedural rule referred to, we wish to point out that at no time was any such argument presented to the Court of Appeals upon the review of this case. The following language appeared in the Reply Brief of the Petitioner (Defendant-Appellant) filed in that court in reply to the argument of the State on the point now before us:

> "The State argues that because the defendant failed to object by pre-trial motion to the admission of evidence seized in an illegal search, her objection during trial to the admission of the evidence violated

a procedural rule and thereby she waived a basic constitutional right to have such evidence suppressed. The State's argument ignores, or indicates a misunderstanding of, the thrust of defendant's argument.

Appellant does not dispute the rule laid down in *State v. Davis*, 30 O. O. 2 16. She simply contends it does not apply in her case, and is not intended to. The Davis rule applies to those situations where the actions of the searchers render the search patently unreasonable and illegal, and hence effectively warn a defendant and his counsel, before trial, that the evidence seized should be suppressed. In such situations a defendant and his counsel have the opportunity to move prior to trial for the suppression of the evidence, thus saving for subsequent appeal this claim of a basic constitutional right should the motion to suppress be overruled."

The Respondent has stated its belief that the procedural rule stated by the Supreme Court in the case of *State v. Davis* is particularly applicable to the present case. We would point out further in our concluding remarks on this issue that there is another basis for comparison between the two cases which is significant. In his opinion in the *Davis* case Chief Justice Taft pointed out, although perhaps by way of dictum, that the judgment of conviction in that case would stand even if the physical evidence had been suppressed because no objection had been made to the testimony of the witnesses who identified the stolen articles of clothing involved in that case. "In this case no objection was made to the testimony of the witnesses with respect to the suits. In view of the very completeness of that testimony and the unobjected showing of the exhibits to the jury on repeated occasions and the lack of any defense by the defendant, the mere acceptance of the exhibits into evidence at the close of the case could

not, in our opinion, have affected the result." (Chief Justice Taft quoting from opinion of Court of Appeals in case of *State v. Dvais, supra.*) Thus the Chief Justice concluded that there was no "reasonable possibility that the mere admission of the suits in evidence," which is all that was objected to by Petitioner and her counsel, "might have contributed to the conviction," applying the test established by this Court in *Fahy v. Connecticut,* 375 U. S. 85, 11 L. Ed. (2d) 171, 84 S. Ct. 299. Certainly the same reasoning and conclusion would appear applicable to the present case where the State's first witness, Mrs. Aebker, testified at length in identifying the three exhibits in the presence of the jury and without objection. (R. 171-177.) When the second and only other witness, John Winters, was called by the state he further identified the same exhibits on direct examination without objection and in the presence of the jury. (R. 215, 216, 220.) On cross-examination counsel for Petitioner once again asked Deputy Winters to identify the exhibits which were at that time also in full view of the jury. (R. 243.)

II.

"Whether a woman alone in her home except for seven police officers who have accused her of a crime and are questioning her while searching her home, has been deprived of her freedom in a significant way so as to bring her within the procedural safeguards of the constitution of the United States as to statements obtained from her by the officers?"

It will be noted that we have set forth in this Brief our separate and independent "Statement of the Case." We have done so for two reasons. First, it appears that the Petitioner has combined argument with its own Statement of the Case, and secondly, there is a notable dispar-

ity between many of the facts as set forth in Petitioner's Statement and those which actually occurred in connection with these proceedings.

The second paragraph under Petitioner's Statement of the Case recites that the Petitioner was home *alone* in her home at 224 E. McKibben Street in Lima, Ohio, the night of February 21, 1966 when six police officers armed with an *illegal* search warrant entered the home, and *after accusing her of concealing stolen property,* conducted a *vigorous and ransacking* nighttime search of her home. (Petitioner's Brief, pp. 3, 4—emphasis supplied.) The Petitioner was not alone in her home at or during the time of the search. The transcript of the testimony of Deputy Winters on cross examination clearly established that a male companion was present during the entire period covered by the search. (R. 226, 277.)

The "fact" that the officers were armed with an *illegal* search warrant is of course not fact at all but simply the claim of the Petitioner which has been discussed at length elsewhere in this Brief. If there is any substantiation in the record of the statement that the police accused the Petitioner at the time referred to of concealing stolen property it has escaped our attention. In the same manner, the words used to describe the search had to have been drawn from some source other than the testimony and evidence presented in this case.

In the next succeeding paragraph the Petitioner is referred to as a "distraught woman." There is no evidence in the case that would support such an observation. The only adjectives used to describe the manner or appearance of the Petitioner at the time of the search was that she was polite and cooperative (R. 225) and nervous. (R. 236.) The connotation normally associated with a person who is cooperative and polite during a search of her

home by law enforcement officials is not particularly that of a distraught individual and we submit that it is impossible to determine whether her nervousness was attributable to the presence of the officers or their presence coupled with her guilty knowledge that within her bedroom closet hung the articles which were the primary subject of the search.

The Petitioner continually throughout her Statement of the Case and argument attempts to create the illusion of one lone female surrounded by six oversized police officers who are levelling questions at her in a demanding tone and rapid fire manner. This is pure illusion and nothing more. We have already pointed out that she had with her in her home a male companion who remained there during the entire period of the search. It is also uncontradicted that of the six officers who participated in the search three of them, Deputy Koontz, Deputy Daley and Detective Saunders, were searching the upstairs of the home while Deputy Winters and Detective Wetzel primarily searched the first or main floor of the home. (R. 240, 242.) During the same period of time some of the officers were searching the basement of the home. It is abundantly clear from the testimony of Deputy Winters that the officers separated into groups to conduct the search and that the Petitioner freely moved about the home during this entire time. Particular attention is drawn to the following questions asked by defense counsel of Deputy Winters on cross-examination and the latter's answers thereto:

"By Mr. DaPore:

Q. Well, you went in all different directions to search this place, is that right?

A. Yes.

Q. And you were asking for keys and upstairs

they were asking for keys, and there were boys in the basement. What were they doing downstairs there?

A. Searching the basement.

Q. Well, was this sort of upsetting to Mrs. Forsythe while the six of you were going in various directions searching her home?

A. She was nervous.

Q. Well, you didn't take Mrs. Forsythe along with you while you made this search of her home, did you?

A. No, sir.

Q. Is there any reason why you couldn't have done this in a proper—or would you think it would have been proper fashion to have searched the home with her present one room at a time and given due regard to her personal items?

A. No, sir." (R. 236.)

We submit that Petitioner's claim that she was under the domination of the officers and "had been deprived of her freedom in a significant way" would be more acceptable if the search had been conducted in the manner suggested by Petitioner's counsel, that is, if all six officers had accompanied the Petitioner from room to room during the search.

We believe it appropriate at this time to discuss briefly the inference drawn by Petitioner throughout her Brief that an excessive number of officers participated in the search of the house in question. We have already established that there were six officers who participated in the search. One additional officer arrived after the search had been completed. (R. 239, 240.) It was established that the home of Petitioner consisted of some nine rooms and that it had four different entrances or exits. (R. 196.) If we are to accept the remarks of Petitioner's counsel in opening statement the residence was being used as a room-

ing house. What is the correct number of officers that should undertake the execution of a search of a nine room house having four different exits and containing an unknown number of occupants? Certainly one or two would appear to be an inadequate number and three or four not unreasonable. We know too from normal experience that where one department, such as the Sheriff's Department in this case, carries its investigation into the incorporated area it is considered normal courtesy to invite members of the local police department to participate in that phase of the investigation. Thus, we submit, there was nothing unusual in the fact that the search party in the present case was composed of four members of the Sheriff's Department which was in charge of the investigation of the burglary of the Aebker residence located in the county and two members of the Lima Police Department. But then it will undoubtedly be suggested that the question is not whether the number of officers dispatched upon the search was excessive but, rather, whether the mere presence of six officers in the home of the Petitioner during the time that certain questions incidental to the search were put to her would require the determination that such constituted custodial interrogation without the requisite admonishment required by the rule established in *Escobedo v. Illinois*, 378 U. S. 478, and further clarified by the decision of this Court in *Miranda v. Arizona*, 384 U. S. 436.

We have no quarrel with the rule announced by this Court in the *Escobedo* case or in the cases which were the basis for the decision in *Miranda v. Arizona*. We do, however, claim the right of total disagreement with Petitioner's application of the rule laid down in those cases to the facts in the present case. It is essential that we keep in mind that in most cases where a search is conducted with a war-

rant the object of the search is something which relates to a crime that has already been committed. In many instances the person in control of the premises to be searched has, or is believed to have, no other connection with the commission of such offense. To phrase the matter differently the usual objective of the search is the location of physical objects rather than persons suspected of crime. In the present case the investigation which led to the search of the Forsythe residence was related to an unsolved burglary which she was not suspected to have committed yet the Petitioner claims that at the moment the officers arrived at her home on February 21, 1966, the investigation had focused upon her to the extent that the officers should have been required to advise her of her rights prior to executing the search warrant then in their possession. Since the defendant was obviously not under arrest or in police custody at this time, it is necessary to invoke the rule of *Miranda* that it be established that the defendant was deprived of her freedom in some significant way. We contend that there is no showing from the evidence that the Petitioner's freedom was in any way limited beyond the fact that a warrant to search the premises at 224 E. McKibben Street in Lima was served upon her. There is absolutely no showing of any physical restraint imposed upon the Petitioner at or during any time covered by the search. She not only was completely free to move about her home but she did in fact do just that. If she could move freely from room to room without supervision by any of the officers present then why couldn't she have left the house via any of the four exits available? It is apparently the contention of the Petitioner that the number of officers present in a person's home during a search is determination of whether that person is deprived of her freedom in a significant way. How can such a standard

be adopted or applied with any degree of logic or fairness? What constitutes the magic number of officers whose presence would produce such a result? If six officers present with a woman *alone* in her home would per se constitute a substantial limitation of her freedom then how many officers would be required to be present when she had an adult male companion present with her at the time of the search? Are we to assume that all persons will react to the same extent and in the same manner to the presence of police officers in their home? Or is it more consistent with human experience to accept the premise that the disposition and reaction of such individuals is a never constant variable? We have no doubt that there are many persons who might react with trepidation to the presence of a single officer at their home with a search warrant. We have also known and observed persons who could and would react with complete complacency in the presence of a dozen officers. The safest rule it seems to us is to leave such determination to the trial court who had the opportunity to view and hear the witnesses who attended the search, including the person in whose custody and control lay the place to be searched, except where the evidence clearly warrants doing otherwise.

The record in this case is completely void of any remarks by Deputy Winters or any other officer which might have been construed as intimidating or coercive. To the contrary, the remarks of Deputy Winters as they appear in the transcript are, we believe, indicative that the officer behaved with complete courtesy and asked only those questions ordinarily deemed necessary in executing a search warrant.

A thorough examination of the decision in the *Miranda* case clearly points up that the holding of the court in that case is directed to the situation where the tech-

niques employed in interrogation of a suspect are conducted in a hostile atmosphere. The majority opinion of the court is replete with references to incommunicado interrogation where a suspect is shut off from the outside world and subjected to lengthy interrogation by the prosecutor or teams of police officers. The entire rationale suggested as the basis for the court's holding in that case is in complete contradiction to the situation in the present case where the Petitioner was in her own home, had a male friend present with her, was obviously free to move about in any way she desired and was subjected to no formal interrogation whatever but was asked the minimum of questions ordinarily essential to execute a search warrant.

To apply the rule of *Miranda* to the case at hand would, we believe, impose an unrealistic limitation on general investigation technique essential to law enforcement in a setting where the constitutional rights of the individual are rarely jeopardized.

III.

The third and final question presented by Petitioner in her Brief is as follows:

"Whether the procedural safeguards of the Constitution of the United States extend to protect a defendant who has declined to testify at her trial against remarks by the prosecutor to the jury about the defendant's failure to call any witnesses to her defense?"

The counsel for the Petitioner devoted the substantial portion of their closing arguments to the jury to attacking the prosecutor for the failure to call additional witnesses in support of its case. Mrs. Rizor and Mr. DaPore criticized the prosecutor for failing to call James

Tarter, an inmate of the Ohio Penitentiary, to elicit from him a judicial confession that he had committed the burglary of the Aebker residence. (R. 284, 290, 291.) The State in its final argument and by way of *rebuttal* to the remarks of defense counsel, pointed out the rarity of obtaining confessions from convicts for offenses with which they have never been charged and further replied to the statements of defense counsel that they could have called him if they desired him to be present. (R. 299, 300.)

Counsel for defense also, in their arguments, criticized the State for not calling Nancy Kitchens, the girl who had furnished the information which led to the search warrant. (R. 284, 289, 290.) The State replied to this criticism by pointing out that first, it was established that she was now a patient in a state hospital, and secondly, that there was no need to argue her creditability at this point since her information had been proven reliable to the extent that the stolen property had been recovered from the precise place where Nancy Kitchens had said it would be. (R. 300.) The defense even suggested that if Nancy Kitchens was too ill to testify that we should have produced a doctor to testify to this fact. (R. 290.)

The defense counsel charged in their argument that the State should have called *all* of the police officers who participated in the search as well as the officer who arrived after the search had been completed. (R. 286.) The State replied to this charge by pointing out that the only two officers whose search produced any results were officers Winters and Wetzel. The other officers searched other parts of the house and found nothing. There is not the slightest indication that they could have offered any testimony either favorable or unfavorable to the accused other than testimony which was entirely of a cumulative nature. Again, the State pointed out that if for some

reason the repetitious testimony of the other six policemen was desired the defense could have called them as witnesses.

The important factors regarding the comments made by the State in its final argument with regard to the witnesses referred to above are:

> (1) That such comments were by way of answer or reply to statements made by the defense.

and

> (2) That the State did not in any true sense criticize the defense for failing to call those witnesses but rather offered its own explanation as to why it had not called them and pointed out that the defense could have produced them had they seen fit to do so.

Certainly it must be conceded that there is a world of difference between the State's voluntary comments upon the failure of the defense to produce witnesses or testimony to rebut the State's case and the State's exercising the right of reply to charges that it had failed to produce witnesses *favorable to the State's case* coupled with the suggestion that the defense had the right to compel the attendance of the same witnesses. We are unable to comprehend how by any manner of reasoning this could be considered a violation of the defendant's right against self incrimination. At no time did the Prosecuting Attorney suggest that the defense *should* have called the other police officers or Nancy Kitchens or James Tarter. To the contrary we stated our opinion that nothing would have been accomplished by doing so. How then can the defense now argue that our purpose was to infer that these witnesses were not called because their testimony would have been unfavorable to the Petitioner?

We do readily concede that the comments made with regard to "Barbara Brown" fall within a different category. It has always been the rule in this jurisdiction that if a witness is not available to the state and whose testimony, if called, would be favorable to the accused is not called the failure to do so is a proper subject for comment by the prosecution. 15 *O. Jur.* 2d, Criminal Law 540. We believe this rule to be a sound one and not inconsistent with the principle laid down in the case of *Griffin vs. California,* 380 U. S. 609. It has long been considered highly improper in the State of Ohio for the prosecuting attorney to make an attack upon the defendant's case because he did not call a particular witness where the witness was available for the State and probably would have testified to that which would have convicted the defendant. *Abrams v. State,* 34 O. App. 13, 170 N. E. 188. The essential ingredients of this theory however are the *availability* of the witness to the state and the likelihood that his testimony would be *damaging* to the accused. Neither ingredient was present in the instant case. As far as the state was concerned Barbara Brown was a name only with no past, present or future. She could not have been more unavailable as a witness if she were dead. Her testimony, if she could have been produced and would have been believed, would have clearly required the defendant's acquittal. How then can it logically or fairly be maintained that to comment upon the failure of the defense to produce her was tantamount to compelling the defendant-Petitioner to incriminate herself?

SUMMARY OF ARGUMENT.

QUESTION No. 1.

Was the procedural rule adopted by the State of Ohio relative to the timely filing of a motion to suppress properly applied in the instant case?

In the present case the Petitioner obviously was aware of the search as of the moment the warrant was read to her. Although not included in the transcript of testimony ordered by the Petitioner in this case it was brought out at a pre-trial hearing that the Petitioner called and talked with one of her attorneys from the Allen County Jail the same night on which the search occurred. A period of almost six months ensued between the search and the trial of the case and it must be presumed since no evidence has been offered to the contrary that the warrant was properly returned and together with the affidavit was available for inspection by Petitioner and her counsel at any time. Pre-trial motions to suppress oral statements made by the Petitioner during the search and to examine the articles taken in the search were filed on behalf of the Petitioner. A full hearing on the motion to suppress was had on the day prior to the trial and the same Deputy Winters testified then that testified at the trial and still no motion to suppress the physical evidence was presented to the Court. The transcript of this hearing was not ordered by Petitioner as part of the Bill of Exceptions in this case for the obvious reason that such would conclusively establish that the Petitioner and her counsel were fully aware of the basis for the search warrant, the contents of both the affidavit and the warrant and the details surrounding the search. The Petitioner has not questioned the propriety of the procedural rule referred to here but has simply claimed that it does not apply to her case. The Petitioner's interpretation of the procedural

rule adopted by this state and referred to herein would require a reviewing court to determine in each case the factual question of whether the knowledge that the evidence was illegally seized was available to the defendant or her counsel prior to the trial.

QUESTION No. 2.

Did the presence of six police officers in the home of the Petitioner during the time that certain questions incidental to the search were put to her constitute custodial interrogation so as to require the admonishment set forth by the Miranda Decision?

A male companion of the Petitioner was present with her at her home when the officers arrived with a search warrant and he remained there during the entire period covered by the search. The Petitioner was free to move about her home without interference by any of the officers present and she did in fact do just that. The home which was the basis of the search consisted of a nine room two-story dwelling with four exits or entrances and was reputedly used as a rooming house at the time of the search. The officers split up in various directions to search various parts of the home without interfering with the Petitioner's freedom of movement. A no time was any physical restraint imposed upon the Petitioner. Any questions put to the Petitioner during the course of the search were of the type necessarily incidental to a search. A full hearing was held prior to the trial of this case on the motion filed by Petitioner to suppress oral statements made by the Petitioner during and following the search. At the hearing the Petitioner and the officer in charge of the search testified at length and were cross-examined in close detail. The Court to which this evidence was presented concluded that the Petitioner was not in custody and that her free-

dom had not been limited in any significant way and therefore overruled the motion as it applied to statements made during the search. The Court did find, however, that subsequent to the identification of the stolen articles by Mr. and Mrs. Aebker, the owners, the Petitioner was arrested and placed in custody and ordered suppressed the statements made by her subsequent to that time. The Petitioner did not order a transcript of the hearing had on the motion to suppress and the evidence adduced thereat is not included in the record of these proceedings.

QUESTION No. 3.

Were the constitutional rights of the Petitioner violated by comments made by the Prosecuting Attorney in his final argument to the Jury?

With the exception of the comments made regarding the failure of the defense to produce Barbara Brown these comments were in reply to statements made by defense counsel in their preceding argument in which they sharply criticized the Prosecution for not calling the other police officers who participated in the search, the Kitchens girl who was a patient in a state hospital and James Tarter who was an inmate at the Ohio Penitentiary. These comments by the Prosecuting Attorney were not by way of criticism toward the defense for not calling these witnesses but to the contrary were offered to explain why the State had not deemed it necessary to call them *and* to point out that the defense could have produced them had they seen fit to do so. At no time did the prosecution suggest that the defense *should* have produced these witnesses.

Barbara Brown constituted a witness who was not available to the state and whose testimony would have been extremely favorable to the accused had she been summoned and testified in support of the claims of the

Petitioner. We concede that it is improper for the prosecution to attack the defendant's case because that defendant failed to call a witness *available to the state and whose testimony would have helped convict such defendant* but neither of these ingredients were present in the instant case.

For the reasons outlined above, the Respondent contends that the writ should be denied.

Respectfully submitted,

ROBERT L. BALYEAT,
Prosecuting Attorney,
Allen County, Ohio,
Attorney for Respondent.